UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GREGORY KENNEY, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	*Civil No. 94-53-P-C*
	)	
CITY OF WESTBROOK, et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This proceeding arises out of a series of incidents involving the plaintiffs and members of the Westbrook Police Department that took place in and around the apartment of two of the plaintiffs in December 1991. The plaintiffs allege, pursuant to 42 U.S.C. ' 1983, that the police officers involved in the incidents violated their rights as secured by the Fourth, Eighth and Fourteenth Amendments to the U.S. Constitution, and that the officers, the police chief and the City of Westbrook itself are therefore liable for damages. Additionally, the plaintiffs have appended state-law claims alleging assault and ``wanton and oppressive" police conduct pursuant to 15 M.R.S.A. ' 704 and negligence and false arrest pursuant to the Maine Tort Claims Act. The defendants have moved for summary judgment based on immunity under both state and federal law and a lack of any offending custom or practice sufficient to make the municipality or its police chief liable pursuant to section 1983 for any of the alleged constitutional violations.

I recommend that the motion be granted in part and denied in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if ``the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence

of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and ``give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). ``Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id*. at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local Rule 19(b)(2). A fact is ``material" if it may affect the outcome of the case; a dispute is ``genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. Factual Context[1]

[1] The defendants have moved to strike the Plaintiffs' Statement of Material Facts Not in Dispute (``Plaintiffs' Statement of Material Facts") (Docket No. 23) for failure to comply with the requirement of Local Rule 19(b)(2) that it state those material facts as to which the plaintiffs contend there exists a genuine issue for trial. Although the plaintiffs' statement is in some respects inartful and confusing, their counsel sufficiently clarified, during a recent telephone conference of the court and counsel, which of their statements are intended to controvert particular facts contained in the Defendants' Statement of Material Facts Not in Dispute (Docket No. 18) (``Defendants' Statement of Material Facts"). *See* Report of Conference of Counsel and Order (Docket No. 27). Accordingly, the plaintiffs' motion is denied. Of course, all properly supported factual statements of the defendants which are uncontroverted are deemed admitted. Local Rule 19(b)(2).

Viewing the record in the light most favorable to the plaintiffs, the following facts emerge: On the evening of Friday, December 20, 1991, the six plaintiffs in this proceeding were attending a party at the Westbrook apartment of plaintiffs Gregory Kenney and Georgia Hanaman. Deposition of Gregory D. Kenney (``Kenney Deposition") at 55-56, 75-77. In response to a complaint from their neighbors, the manager of the apartment complex telephoned Kenney and Hanaman and asked them to turn down the music in the apartment. Deposition of Matthew Hollyday (``Hollyday Deposition") at 9-10. Apparently because they continued to be disturbed by the noise, the two neighbors who had complained to the manager then called the Westbrook Police Department at approximately 8:00 p.m. Exhs. 1, 2, 7 and 8 to Deposition of Alan R. Twombley (``Twombley Deposition"). Defendants Alan Twombley and Jeff St. Peter, both Westbrook police officers, were dispatched to the apartment. Exh. 7 to Twombley Deposition at 2. When they arrived, they heard only low-volume music coming from the residence. Twombley Deposition at 21. Officer Twombley thus surmised that the occupants of the apartment had a police scanner on the premises and had turned down their music upon learning via radio of their neighbors' complaint. *Id*. at 22.

Nearly two hours later, at approximately 9:53 p.m., officers Twombley and St. Peter were again dispatched to the Kenney-Hanaman residence, this time via a private radio channel, in response to a second noise complaint from the same neighbors. Exh. 7 to Twombley Deposition at 2. On this occasion, the two officers heard loud music coming from the apartment. *Id*. Officer Twombley then spoke with Hanaman, told her that the music must be turned down and warned her that if the police were again called to her apartment on a noise complaint she would be arrested for disorderly conduct. *Id*., Twombley Deposition at 25.

The police were dispatched to the Kenney-Hanaman residence a third time at 10:41 p.m., again in response to a noise complaint. Exh. 7 to Twombley Deposition at 2. Joining officers Twombley and St. Peter was Officer Daniel Austin, also a defendant. *Id*. at 2-3. The three officers heard loud music coming from the apartment. Twombley Deposition at 32. Officer Twombley knocked on the door, saw someone look out the window and then heard someone locking rather than opening the door. *Id*. Between one and three minutes elapsed; Hanaman eventually opened the door, but with the chain still attached, so she could speak with the officers. *Id*., Deposition of Georgia L. Hanaman (``Hanaman Deposition") at 83, 85. The officers advised Hanaman that she was under arrest for disorderly conduct. Twombley Deposition at 33.

After Hanaman shut the door to remove the chain and then reopened it, officers Twombley and St. Peter entered the apartment and Twombley attempted to arrest Hanaman. Twombley Deposition at 34; Hanaman Deposition at 89, 91; Deposition of Jeffrey C. St. Peter (``St. Peter Deposition") at 14. Hanaman did not submit voluntarily, refused to be handcuffed and shouted to Twombley that she refused to be arrested. Twombley Deposition at 34; Hanaman Deposition at 93. As the officers attempted to arrest Hanaman, others in the apartment began asking the officers why they were arresting her, leading the officers to scream at the occupants. Hanaman Deposition at 93. A struggle ensued between Hanaman and the arresting officers, St. Peter radioed for additional assistance and someone struck Officer St. Peter on the back. Twombley Deposition at 36; St. Peter Deposition at 15.

The first two officers to arrive in response to the request for help were officers Thomas Roche, Jr. and Roland Disney, both defendants in this proceeding. Twombley Deposition at 38. Ultimately, three other officers and a sergeant also responded. *Id*. On arriving at the scene, Officer

Roche jumped out of his patrol car and ran toward the apartment just as someone slammed the apartment door shut. Deposition of Thomas S. Roche, Jr. (``Roche Deposition") at 9. Roche, followed by Disney, forced his way into the apartment, damaging the molding on the doorway. *Id*.; Twombley Deposition at 38. Hanaman had, by this time, been subdued by the officers who had originally entered and was being led away in handcuffs. Roche Deposition at 10; Twombley Deposition at 38.

The occupants of the apartment followed Hanaman and the arresting officers out of the apartment and continued to protest the arrest. Twombley Deposition at 40-41; Deposition of Michael A. Brown (``M. Brown Deposition") at 11. Kenney invited one of the officers ``to take his badge off," Hanaman Deposition at 93; other than this, no one made any threatening gestures or remarks to the officers at the scene, *id*. at 95.[2] The occupants were told that if they did not return to the apartment they would be arrested. M. Brown Deposition at 12.

Handcuffed, Hanaman remained in the police cruiser while officers went to speak with her neighbors. Hanaman Deposition at 102. She then began kicking the door of the cruiser. *Id*. at 102-03. She did so because she saw her cats leave her apartment through its open door, saw Kenney come outside after them and thus attempted to distract the police from following through on their threat to arrest Kenney. *Id*. The officers came over to the cruiser, dragged Hanaman out of the car

[2] According to two of the officers at the scene, Kenney shouted at the officers and challenged them to a fight. Deposition of Robert D. Ryder (``Ryder Deposition") at 9; M. Brown Deposition at 11-12. For purposes of the summary judgment motion, I presume this properly controverted allegation to be untrue.

and threw her to the ground face-first. *Id*. at 105. The officers placed Hanaman in shackles and returned her to one of the cruisers. Twombley Deposition at 40; St. Peter Deposition at 26; Hanaman Deposition at 107. The officers struck her on the arms and legs in order to subdue her. Hanaman Deposition at 107-08.

The police transported Hanaman to the Cumberland County Jail. Exh. 7 to Twombley Deposition at 4. The officers at the scene warned those left behind that they would all be arrested if the police were called to the scene again. Twombley Deposition at 42. The officers then met down the street in a school parking lot to discuss the situation. *Id*. at 49; M. Brown Deposition at 14. At the meeting, Office Brown expressed dismay that the sergeant at the scene had not ordered all of the apartment occupants arrested, and it was Brown's understanding that if the police were called to the apartment again everyone would be placed under arrest. M. Brown Deposition at 15-16.

At 12:22 a.m. on Saturday, December 21, less than two hours after the previous call, a complaint from the same neighbors of excessive noise dispatched the police to the Kenney-Hanaman apartment for the fourth time. Roche Deposition at 15; Twombley Deposition at 50-51. Ultimately, all Westbrook police officers then on duty responded. *Id*. at 50. Twombley went to the home of the neighbors to obtain their statement as to the nature of their complaint. *Id*. at 51; Deposition of Kirkwood L. Malloy (``Malloy Deposition") at 14. The neighbors complained of banging on the common wall that separated them from the Kenney-Hanaman apartment. Twombley Deposition at 51. The police then approached the Kenney-Hanaman apartment, Twombley knocked on the door and, when he received no answer, identified himself as the police. *Id*. at 52. Again there was no response. *Id*. One of the defendants, Sergeant Kirkwood Malloy, gave the order to enter the

premises. *Id*. at 52-53; Malloy Deposition at 16. One of the officers then forced the door open and the police entered the apartment. *Id*. at 15.

Upon entering, Twombley immediately advised Kenney that he was under arrest. Twombley Deposition at 54. Kenney resisted and was subdued only after one of the other officers sprayed him with the chemical ``Cap-Stun." *Id*. at 55-56. Another occupant of the apartment, plaintiff Frank Cope, was also involved in a struggle with the police that culminated in his being handcuffed and placed under arrest by Roche and Officer Ronald Disney, also a defendant. Deposition of Ronald Disney, Jr. (``Disney Deposition") at 18; M. Brown Deposition at 24-25. The police ``maced" Cope when he refused to get up from a couch and submit to arrest. Deposition of Frank Cope (``F. Cope Deposition") at 54-55.

While the police were struggling with Frank Cope, his wife, plaintiff Robin Cope, interfered by jumping on the back of one of the officers and hitting him. F. Cope Deposition at 11; Deposition of Allen M. Tundel (``Tundel Deposition") at 20. She was arrested herself on a charge of obstructing government administration. Exh. 1 to Tundel Deposition. Kenney's sister, plaintiff Judith Lestage, was also arrested on a charge of disorderly conduct after voicing her emphatic disapproval of what was transpiring. M. Brown Deposition at 25-26; Deposition of Judith A. Lestage (``J. Lestage Deposition") at 4. Finally, plaintiff Raymond Lestage, husband of Judith Lestage, was arrested on a charge of disorderly conduct after he, too, shouted his disapproval at the police. Ryder Deposition at 12-14; Deposition of Raymond A. Lestage (``R. Lestage Deposition") at 7.

Defendant Ronald Allanach, who was chief of the Westbrook Police Department on the dates relevant to this proceeding, was not present during any of the events described above or otherwise involved in them. Affidavit of Ronald Allanach (``Allanach Affidavit") (Docket No. 17) at && 2, 7.

Several individuals have complained about the alleged use of excessive force by the Westbrook Police Department from the mid 1980s through 1990. *See* Affidavits of Deborah Ellis, Gerald King, Michael Kirk, Philip Land, Thomas Lavigne, David Trecartin, Michael Whitten, Mark Murray, Roger Maynard and James Levesque, appended to Plaintiffs' Statement of Material Facts. In June 1989 the Cumberland County District Attorney wrote a letter to Chief Allanach to complain that:

> I and my office have become increasingly disturbed by what appears to be both excessive use of force and the premature use of force by members of your department. Particularly disturbing is the report by your department that the disabling chemical, mace, is to be utilized for subduing potential troublemakers. Furthermore, some of your officers would rather fight than talk.
>
> The upshot of this apparent policy by your department is the undermining of credibility of your department before [Maine] District Court judges sitting in Portland. In other words, your department has developed a reputation and not a good one. Furthermore, the cases which are brought by your department where force is utilized are being jeopardized because of this use of force. I would also assume that your potential civil liability is being enhanced by these incidents.
>
> I cannot tell you how to run your department. But I would suggest that you draft, implement and enforce a reasonable use of force SOP, especially with regard to the use of mace, Kell lights and nightsticks if one is not existing already. If one is existing, I suggest you educate your officers carefully and completely on the use of force and take the necessary administrative action where and when appropriate.
>
> I would hope that another letter such as this will be unnecessary as this problem has
>
> been brought to your attention previously.

Exh. A to Affidavit of Paul Aranson, appended to Plaintiffs' Statement of Material Facts. Thus, the city has been on notice since at least June 1989 about allegations of excessive force used by its police department. Indeed, a state court jury specifically found in one case that the city had a policy or custom of ``inadequately supervising and disciplining its police officers amounting to approval of the

use of excessive force against arrestees." *See Hicks v. City of Westbrook*, 649 A.2d 328, 1994 Me. LEXIS 194 (Oct. 28, 1994) at *3.

Law enforcement officers in Maine are trained by the Maine Criminal Justice Academy that, in situations involving disorderly conduct complaints at a private residence, the owner or occupant of the residence can be warned about the conduct and if the conduct does not abate, the owner or occupant can be arrested for disorderly conduct. Deposition of A. Richard Mears (``Mears Deposition") at 40-41. With regard to the handling of complaints of disorderly conduct at a residence address in Westbrook, the city's police officers were instructed to make contact with the people allegedly being disorderly and to warn them that if the police are called to the scene again the owners and occupants of the residence would be arrested. Deposition of Inger M. Johnson (``Johnson Deposition") at 6-7; Tundel Deposition at 58; M. Brown Deposition at 32; Ryder Deposition at 23-24; Deposition of Daniel W. Austin (``Austin Deposition") at 43; Disney Deposition at 13-14.

During his tenure as chief, Allanach received notices of claims from potential plaintiffs with complaints about the department ``all the time." Exh. 4 to Allanach Deposition at 14. Nevertheless, Chief Allanach never concluded that training his officers in the proper use of force should take priority over the other training needs of his department. *Id*. at 47-49.

III. The Section 1983 Claim

Discretionary Immunity and the Individually-named Officers

The defendants contend that the individual officers named in the complaint (the ``individual officers") are entitled to the qualified immunity from civil liability granted to government officials in

the performance of discretionary functions. This qualified immunity shields a government official from section 1983 liability for alleged constitutional rights violations ``as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citations omitted); *see also Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Topp v. Wolkowski*, 994 F.2d 45, 48 (1st Cir. 1993); *Hegarty v. Somerset County*, 848 F. Supp. 257, 263 (D. Me. 1994); *Maguire v. Municipality of Old Orchard Beach*, 783 F. Supp. 1475, 1779-80 (D. Me. 1992).

> [W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the ``objective legal reasonableness" of the action, assessed in light of the legal rules that were ``clearly established" at the time it was taken.

Anderson, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 819, 818). The Supreme Court has explained that the phrase ``clearly established" in this context means that

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640 (citations omitted); *see also Rodriguez v. Comas*, 888 F.2d 899, 901 (1st Cir. 1989).[3] The court must conduct a two-step analysis, first determining whether the law

[3] In making this point, the defendants rely on an earlier opinion in *Rodriguez* that was subsequently withdrawn by the First Circuit Court of Appeals. *See* Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment (``Defendants' Memorandum") (Docket No.

establishing the right was clearly established, and, if so, whether a reasonable officer could have believed that the challenged action was lawful in light of the specific circumstances of the challenged action and the information possessed by the officers. *Maguire*, 783 F. Supp. at 1480 (citation omitted).

The defendants concede that Hanaman and Kenney had a clearly established right to be protected from illegal police entry into their home, and that all of the plaintiffs enjoyed a right not to be subject to false arrest and the use of excessive force by the police. The defendants base their contention that the individual officers are entitled to qualified immunity on an assertion that when the individual officers entered the Hanaman-Kenney residence and made their forcible arrests, they acted in an objectively reasonable manner because they did not believe that their actions violated any clearly established right.

In order to enter a home for the purpose of making an arrest, police must have probable cause to believe that the person being sought has committed an offense. *Hegarty*, 848 F. Supp. at 263 (citing *Wong Sun v. United States*, 371 U.S. 471, 479-80 (1963)). The Maine Criminal Code provides in relevant part that a police officer may arrest without a warrant ``[a]ny person who has committed in his presence or is committing in his presence any Class D or Class E crime." 17-A M.R.S.A. ' 15(1)(B). Disorderly conduct is a Class E crime, 17-A M.R.S.A. ' 501(6), and is committed when a person, in a ``private place . . . makes loud and unreasonable noise which can be

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16) at 14. However, it appears that the issue that prompted the withdrawal and substitution of a new opinion is not material to the issue of qualified immunity, and that *Rodriguez* ultimately stands for the proposition asserted by the defendants. *See Rodriguez*, 888 F.2d at 901, 905.

heard as unreasonable noise in a public place or in another private place, after having been ordered by a law enforcement officer to cease such noise," *id*. at ' 501(3). For purposes of authorizing a warrantless arrest,

> criminal conduct has been committed or is being committed in the presence of a law enforcement officer when one or more of the officer's senses afford him personal knowledge of facts which are sufficient to warrant a prudent and cautious law enforcement officer in believing that a Class D or Class E crime is being or has just been committed and that the person arrested has committed or is committing it. [Such an arrest] shall be made at the time of the commission of the criminal conduct, or some part thereof, or within a reasonable time thereafter or upon fresh pursuit.

17-A M.R.S.A. ' 15(2). Based on the foregoing, the defendants contend that the individual officers had probable cause to arrest Hanaman, or that they were reasonable in believing they had probable cause to make such an arrest. As the defendants note, Hanaman's arrest on the officers' third visit to their home is consistent with the training protocol of the Maine Criminal Justice Academy, which advises in cases of loud noises the giving of a warning to the owner or occupant of the residence and then arrest on a charge of disorderly conduct if the noise persists. It is also consistent with the

``personal knowledge" requirement in section 15(2) since the individual officers heard excessive noise emanating from the Kenney-Hanaman apartment immediately prior to the arrest.[4]

The plaintiffs contend that the officers were without personal knowledge that it was Hanaman who was responsible for the excessive noise, and therefore without authority to arrest her. This is an attempt to stretch the definition of personal knowledge to the point of absurdity. The plaintiffs do not contend that the police were unaware that Hanaman was one of the tenants, as distinguished from one of the guests, of the Kenney-Hanaman apartment. It was in her capacity as tenant that Hanaman received the officers' previous warning that she would be arrested if the noise continued. If, in the circumstances, it was unreasonable of the officers to effect a subsequent arrest of Hanaman when the excessive noise failed to abate, then the police would essentially be rendered powerless to deal with such a disturbance. In her deposition, Hanaman appears to concede that whatever musical noise was coming from the apartment on the night in question was emanating from her stereo. *See* Hanaman Deposition at 63, 66, 70. A stereo, to be excessively loud, requires no one to be standing at its

[4] The plaintiffs contend that there is a genuine issue of material fact as to whether any of the individual officers heard excessively loud music emanating from the Kenney-Hanaman apartment prior to the arrest of Hanaman. *See* Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (``Plaintiffs' Memorandum") (Docket No. 22) at 16. However, nowhere in the plaintiffs' statement of material facts do they attempt to controvert the assertion of Officer Twombley that the officers at the scene heard loud music coming from the apartment immediately prior to Hanaman's arrest. The plaintiffs have therefore waived any right to controvert this properly supported factual allegation. *See McDermott v. Lehman*, 594 F. Supp. 1315 (D. Me. 1984).

controls where she can be observed by the police committing the crime of disorderly conduct. In the circumstances, it was reasonable for the police to hold one of the tenants responsible for the noise that they had heard coming from the premises, and therefore reasonable for them to assume they had probable cause to arrest Hanaman for disorderly conduct.

That does not end the inquiry, however, because the officers were without constitutional authority to enter Hanaman's home without an arrest warrant unless there were exigent circumstances requiring such an entry. *See Minnesota v. Olson*, 495 U.S. 91, 100 (1990); *see also Hegarty*, 848 F. Supp. at 263-64. The Supreme Court has made clear that the requisite exigent circumstances are almost never present when the police propose to enter a private residence for the purpose of making an arrest for a minor offense. In *Welsh v. Wisconsin*, 466 U.S. 740 (1984), the Court held that no exigent circumstances justified the warrantless nighttime entry into the home of a defendant whom the authorities believed had recently been driving while intoxicated, a nonjailable civil traffic offense under Wisconsin law. The Court observed that

> [w]hen the government's interest is only to arrest for a minor offense, [the] presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

Id. at 750.

> [I]t is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor. . . . [A]pplication of the exigent-circumstances exception in the context of a

> home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed.

Id. at 753.

The defendants concede that the existence of exigent circumstances justifying entry into the Kenney-Hanaman home is ``subject to argument." Defendants' Memorandum at 23 n.8. All the more reason, they contend, for the court to conclude that the officers were reasonable in their belief that they had authority to gain entry. I agree, and believe that this is the conclusion required by the Supreme Court's holding in *Anderson*. To have been objectively unreasonable, the unlawfulness of the officers' entry into the apartment had to have been ``apparent" to the officers ``in the light of pre-existing law." *Anderson*, 483 U.S. at 640 (citations omitted).

As the Court noted,

> it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials -- like other officials who act in ways they reasonably believe to be lawful -- should not be held personally liable.

Id. at 641 (citations omitted). The same principle applies to the question of exigent circumstances. I express no view as to whether, in light of the strong presumption articulated in *Welsh* against a finding of exigent circumstances when the alleged offense is a minor one, Hanaman's warrantless arrest passes constitutional muster. What conspicuously distinguishes this case from *Welsh* is the fact that the police did not pursue Hanaman into her apartment, but came into a dwelling place that was the situs of the alleged criminal activity and were acting, at least in part, to prevent a recurrence of that activity. As the Supreme Court of Appeals of West Virginia has noted in a similar section

1983 case, the notion in *Welsh* that it ``difficult to conceive" of validly exigent circumstances in connection with a minor crime can fairly be read as not ruling out such a possibility. *Goines v. James*, 433 S.E. 2d 572, 577 (W.Va. 1993), *cert. denied*, 126 L. Ed. 2d 686 (1994).[5] The officers who arrested Hanaman could reasonably have shared the view of the West Virginia court that the principle articulated in *Welsh* leaves this area of the law ``murky." *Id*. at 578. Since it was not apparent to them that their arrest of Hanaman was unlawful, they are entitled to qualified immunity concerning their decision to enter her home and arrest her.

The defendants further contend that the individual officers are entitled to qualified immunity regarding the arrests made during the officers' fourth visit to the Kenney-Hanaman apartment. They contend that the same ``exigent circumstances" analysis discussed above applies to the entry of the officers on the fourth visit. And, as for the question whether the officers used excessive force in making the remainder of their arrests, the defendants rely on *Graham v. Connor*, 490 U.S. 386 (1989), in which the Supreme Court discussed ``reasonableness" as the proper standard to be used in section 1983 cases that involve a claim that police used excessive force in the making of an arrest. *Id*. at 395; *see also id*. at 397 (``[T]he question is whether the officers' actions are `objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."). The plaintiffs agree with the defendants that *Graham* provides the proper standard for evaluating excessive force claims, but rely on the discussion of exigent circumstances in *Hegarty*, and on *State v. Clisham*, 614 A.2d 1297 (Me. 1992), in contending that

[5] As the West Virginia high court correctly noted, *Welsh* contains no definitive holding or any dicta clearly establishing under what circumstances a warrantless home arrest upon hot pursuit from the commission of a misdemeanor in the officer's presence would constitute a Fourth Amendment violation. *Id*.

the officers' entry into the Kenney-Hanaman residence on their fourth visit was an illegal one, and that, therefore, the arrests themselves, and any use of force on that occasion, were illegal. In *Clisham*, the Law Court reversed the defendant's conviction on a charge of criminal threatening, holding that he was justified in threatening the use of deadly force to prevent a criminal trespass by police officers because the officers were without a warrant or probable cause. *Id*. at 1298-99.

Both sides have lost sight of the issue before the court, which is not whether the use of force was illegal, but whether the officers are entitled to qualified immunity for any liability based on their fourth visit to the Kenney-Hanaman residence. As with their entry on the third visit, pursuant to *Anderson*, the officers are entitled to qualified immunity in connection with their entering the apartment unless it was apparent, in light of pre-existing law, that the entry was unlawful. As for the fourth visit, the question is a closer one because the record does not demonstrate that any of the officers had personal knowledge that any of the plaintiffs had committed the offense of disorderly conduct immediately prior to the fourth visit. Rather, the officers spoke with neighbors who complained of excessive noise emanating from the apartment between the third and fourth visits. Section 15(2) permits a warrantless arrest in connection with a Class E offense ``within a reasonable time" after the police acquire personal knowledge. The officers had such personal knowledge when they made their third visit, approximately an hour and 40 minutes earlier. Without expressing an opinion as to whether this constitutes a ``reasonable time" as that term is used in section 15(2), I conclude, pursuant to *Anderson*, that it was not apparent based on pre-existing law in Maine that police who had personal knowledge of disorderly conduct at 10:41 p.m. could not make a warrantless arrest in connection with that crime at 12:22 a.m. upon receiving a complaint that the conduct had been ongoing. And, for the reasons I discussed in connection with the third visit, it was

not apparent to the officers, based on pre-existing law, that there existed no exigent circumstances sufficient to justify a warrantless entry into the apartment upon making their fourth visit of the evening based on an ongoing series of noise complaints.

Applying an *Anderson*-type analysis to the level of force used by the police in making their arrests on the fourth visit, I conclude that it would not have been apparent to the officers that their actions were unlawful. As the Supreme Court reemphasized in *Graham*, ``the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396 (citation omitted).

It is uncontroverted that defendants Kenney and Frank Cope resisted arrest and that defendant Robin Cope actually attacked the officers while they were attempting to subdue Frank Cope. There was no preexisting law on that occasion that would have made it apparent to the officers that their actions were illegal.

Accordingly, as to the plaintiffs' section 1983 claim, I conclude that the individual officers are immune from liability.

The City of Westbrook and Chief Allanach

The plaintiffs allege in their complaint that the section 1983 violations committed by the individual officers

> were proximately caused by the failure of the City of Westbrook acting through Chief Allanach to adequately recruit, select, train, discipline and supervise its officer employees all with reckless disregard for the rights of persons such as the Plaintiffs with whom those officer employees would come in contact.

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There is no *respondeat superior* or vicarious liability under section 1983. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989).

> Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under ' 1983.

Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 691 (1978). Any offending custom or practice ``must be so well-settled and widespread that the policymaking officials of the municipality can be said to have actual or constructive knowledge of it yet did nothing to end the practice." *Bordanaro v. McLeod*, 871 F.2d 1151,1156 (1st Cir.), *cert. denied*, 493 U.S. 820 (1989). The inadequacy of police training may serve as the basis for liability pursuant to section 1983 ``only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton*, 489 U.S. at 388; *see also Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 92 (1st Cir. 1994) (for a supervisor to be personally liable in a section 1983 case involving allegedly improper police training, he ``must demonstrate reckless or callous indifference to the rights of citizens"); *Jackson v. Inhabitants of the Town of Sanford*, 1994 U.S. Dist. LEXIS 15367 at *19-*20 (D. Me. Sept. 23, 1994) (no deliberate indifference in municipality's failure to train officers in distinguishing criminal behavior from symptoms of disability).

The City of Westbrook and Allanach contend that they are entitled to summary judgment because the record is devoid of any deliberate indifference to constitutional rights on the part of Allanach or anyone else in a supervisory capacity at the Westbrook Police Department. The plaintiffs make the opposite argument, maintaining that such a deliberate indifference is reflected in

the department's training concerning the handling of disorderly conduct complaints. What the plaintiffs find objectionable is the department's policy of first warning the owner(s) and occupant(s) of the premises, and then arresting those persons if the complaints persist.

I agree with the plaintiffs that the defendants have failed to meet their burden of demonstrating that they are entitled to judgment as a matter of law regarding the level of attentiveness given to constitutional rights in the training the officers received on the handling of disorderly conduct complaints. In *Jackson*, this court found that a municipal police department had failed to train its officers properly in distinguishing criminal conduct from the symptoms of a disability. *Id.* at *20. The court nevertheless granted summary judgment to the municipality as to its section 1983 liability because the plaintiff had produced no evidence that, prior to his improper arrest as a result of exhibiting the symptoms of a disability, ``any Town official deliberately or recklessly decided against training police to deal with disabled persons with the knowledge that their rights would likely be violated." *Id*. There was ``no evidence that any Town official was aware of any previous improper arrests of disabled persons, nor that Town officials were aware prior to [the plaintiff's] arrest that special training might be advisable." *Id*.

The circumstances of the present case contrast sharply with those in *Jackson*. After setting forth the department's policy on arrests for disorderly conduct, the defendants offer conclusory statements from Allanach's affidavit to the effect that the Westbrook Police Department has no custom, policy or practice that allows for unlawful arrest or illegal entry into a private home. *See* Defendant's Statement of Material Facts && 78-79. Other than that, the defendants' factual statement is devoid of guidance as to what the department's training policies and practices are in these sensitive areas of constitutional law. In particular, the defendants' factual statement contains no information

on how Westbrook police officers are trained in the use of chemicals to restrain uncooperative arrestees, and whether the officers are trained to consider the existence of probable cause and exigent circumstances before entering private homes and making warrantless arrests in disorderly conduct cases.

As suggested in *Jackson*, the City of Westbrook would nevertheless be entitled to summary judgment on the section 1983 claim if the plaintiffs had produced no evidence to suggest that the City of Westbrook was deliberately indifferent to the need to train its officers on the lawful use of force. Allanach received a warning from the local prosecutor in June 1989, some two and a half years before the events that gave rise to this lawsuit, that the Westbrook Police Department had a policy of using excessive force, including the improper use of disabling chemicals. He nevertheless concluded that training in the proper use of force was not a priority. This is sufficient to generate a genuine issue of material fact as to whether the City of Westbrook had made a deliberate or conscious choice not to train its officers properly on the use of force, a subject that is central to the exercise of police power within proper constitutional boundaries. I therefore conclude that the City of Westbrook is not entitled to summary judgment on the plaintiffs' section 1983 claim.

IV. The State-Law Claims

The City of Westbrook

The defendants contend that the City of Westbrook is entitled to absolute immunity on all state-law claims pursuant to the Maine Tort Claims Act, 14 M.R.S.A. ' ' 8101-18. The Act contains a broad grant of immunity to government entities, *see id*. at ' ' 8103, 8104-B, subject to certain enumerated exceptions, *see id*. at ' 8104-A. The plaintiffs rely on section 8116 of the Act, which provides in relevant part that if a governmental entity procures liability insurance that ``provides coverage in areas where the governmental entity is immune, the governmental entity shall by liable in those substantive areas but only to the limits of the insurance coverage." The governmental entity bears the burden of establishing that it does not have insurance coverage for that claim, and thus has not waived its immunity. *Hegarty*, 848 F. Supp. at 270; *Maguire*, 783 F. Supp. at 1489; *Hill v. Town of Lubec*, 609 A.2d 699, 700 (Me. 1992). As the plaintiffs note, the defendants have made no attempt to meet this burden. Accordingly, the City of Westbrook is not entitled to summary judgment on the state-law claims based on the assertion that it is absolutely immune pursuant to the Maine Tort Claims Act.

The Individually-named Defendants

The Maine Tort Claims Act provides that employees of governmental entities enjoy absolute immunity from civil liability for

> [p]erforming or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid.

14 M.R.S.A. ' 8111(1)(C). Subsection 8111(1) further provides that this discretionary immunity

> shall be applicable whenever a discretionary act is reasonably encompassed by the duties of the governmental employee in question, regardless of whether the exercise of discretion is specifically authorized by statute, charter, ordinance, order, resolution, rule or resolve and shall be available to all governmental employees, including police officers . . ., who are required to exercise judgment or discretion in performing their official duties.

The defendants rely on this provision in contending that the individually-named officers are absolutely immune from liability for their actions on the night in question.

The plaintiffs assert that the immunity provisions of the Act do not apply to Count I of their complaint, which states a claim for assault pursuant to 15 M.R.S.A. ' 704. The Tort Claims Act provides that, ``[w]hen any other statute expressly provides a waiver of governmental, sovereign or official immunity, the provisions of that statute shall be the exclusive method for any recovery of funds in any fact situation to which that statute applies." 14 M.R.S.A. ' 8113(2). Such an express waiver appears in section 704, which authorizes police officers to arrest and detain without a warrant persons found violating any law of the state, ``but if, in so doing, he acts wantonly or oppressively . .

. he shall be liable to such person for the damages suffered thereby." 15 M.R.S.A. ' 704. This provision dates from 1848. *See Burke v. Bell*, 36 Me. 317, 320 (1853). Noting that the Law Court has never ruled on the question of whether, and to what extent, section 704 has been abrogated by the subsequent enactment of the Tort Claims Act and the immunity provisions specifically applicable to police officers, the plaintiffs contend that the Act does not provide immunity for claims of wanton and oppressive police conduct in connection with an arrest. This court has recently indicated that it looks with disfavor on the notion that a plaintiff may defeat a police officer's discretionary immunity by invoking section 704 inasmuch as ``the Maine Legislature enacted the Maine Tort Claims Act as a comprehensive measure to define the standard of liability under state law for governmental entities." *Jackson*, 1994 U.S. Dist. LEXIS 15367 at *7 n.2. The court did not resolve the question, however, concluding that the conduct at issue there fell well short of the ``wanton and oppressive" standard in any event. *Id*.; *see also McLain v. Milligan*, 847 F. Supp. 970, 977 (D. Me. 1994) (section 704 a ``possible limitation" on discretionary immunity).

In *Hegarty*, this court noted that the making of a warrantless arrest is a discretionary function within the meaning of the Tort Claims Act, and that the immunity provided by the Act to police officers exercising discretionary functions is unavailable when the officer's conduct is ``so egregious that it `clearly exceeded, as a matter of law, the *scope* of any discretion he could have possessed in his official capacity as a police officer.'" *Hegarty*, 848 F. Supp. at 269 (quoting *Polley v. Atwell*, 581 A.2d 410, 414 (Me. 1990) (emphasis in original)). In *Leach v. Betters*, 599 A.2d 424 (Me. 1991), the Law Court held that police conduct was not ``wanton or oppressive" within the meaning of section 704 because the record contained ``no hint of ill will, bad faith, or improper motive" even if the arresting officers ``may have used more force than was necessary." *Id*. at 426. Thus, the notion

that police officers may commit acts for which they will not enjoy immunity, because those acts are not within the scope of the officer's discretion, is consistent with the legislature's having not repealed section 704 when it enacted the Tort Claims Act.

The plaintiffs cite *Martel v. Inhabitants of the Town of Old Orchard Beach*, 404 A.2d 994 (Me. 1979), to support their contention that their claim for assault is outside the Tort Claims Act pursuant to section 8113(2) of the Act. *Martel* involved a determination of what county was the proper venue for the plaintiff's complaint alleging a municipality's negligence in maintaining a sidewalk. *Id*. at 995. The plaintiff contended that the Tort Claims Act was applicable and that venue was therefore proper in her home county. *Id*. at 996. Relying on section 8113(2) of the Act, the Law Court disagreed, holding that a statute outside the Act provided for actions against municipalities or counties for bodily injury sustained as a result of ``any defect or want or repair or sufficient railing in any highway, town way, causeway or bridge." *Id*. at 996. Because this statute did ``encompass the fact situation" in the plaintiff's claim, the court held it exclusively applicable to the claim, and as a result determined that a separate venue provision governing suits for highway defects (requiring the action to be tried in the county in which the town is situated) was applicable. *Id*. at 997.

Like the present case, *Martel* involved an express waiver of sovereign immunity that antedates by many years the Tort Claims Act. *See id*. at 997 n.5. But it was far clearer in *Martel* that the ``fact situation" presented by the plaintiff falls squarely within the express waiver provided by the separate statute, which covers every claim involving highway defects. *Cf. Clockedile v. State of Maine Dept. of Transp.*, 437 A.2d 187, 190 (Me. 1981) (case involving alleged municipal duty to post signs, traffic lights and traffic officers went beyond mere allegation of highway defect; Tort Claims Act applicable). Section 704 does not cover every claim involving police misconduct, and it

would do violence to the provisions of the Tort Claims Act that confer immunity to police officers exercising discretionary functions to permit a plaintiff to defeat the immunity simply by invoking section 704 and alleging that the defendant officers acted wantonly or oppressively. Some further inquiry into the wantonness and oppressiveness of the alleged conduct is necessary, similar if not identical to the inquiry conducted by the court in *Hegarty* as to whether the police conduct was sufficiently ``egregious" to exceed the scope of any discretion accorded a police officer. *See Hegarty*, 848 F. Supp. at 257. But in conducting that inquiry, it is necessary to bear in mind that

> Maine courts are hesitant to second-guess the judgment of police officers acting within the line of duty and place a heavy burden on plaintiffs to demonstrate conduct falling well outside an officer's discretionary duties when seeking civil damages in tort suits.

McPherson v. Auger, 842 F. Supp. 25, 29 (D. Me. 1994) (no excessive force in making arrest despite handcuff-caused injury to arrestee).

The plaintiffs contend that the police exceeded the scope of their discretion because they were not authorized in the circumstances to effect warrantless arrests in connection with the alleged commission of a Class E crime. Assuming without deciding that the officers' actions were beyond the authority conferred upon them by the statute governing warrantless arrest, I conclude that such a circumstance is not in itself sufficient to defeat the discretionary immunity provided to police officers. *See, e.g., Jenness v. Nickerson*, 637 A.2d 1152, 1154-55, 1159 (Me. 1994) (discretionary immunity covered officers who, while executing search warrant at night, roused sleeping child from bed, refused to let child use bathroom in privacy, refused to permit naked adult to put on clothing, interrogated the adult without giving any *Miranda* warnings, made sexually suggestive remarks to

her, and viewed and commented on photographs of her engaged in intimate activity). Viewing the facts in the light most favorable to the plaintiffs, there is nothing in the record to suggest that the officers acted in bad faith, knowingly violated any constitutional or statutory rights, or otherwise acted outside the scope of their discretion. Accordingly, the individual officers are entitled to the discretionary immunity provided by the Tort Claims Act with respect to the state-law claims.

The defendants also contend that Chief Allanach is entitled to discretionary immunity. The performance of supervisory activities is one of the discretionary functions that gives rise to immunity pursuant to section 8111(1)(C) of the Tort Claims Act. *Bowen v. Dept. of Human Services*, 606 A.2d 1051, 1055 (Me. 1992). Since all of the allegations against Chief Allanach involve the training and supervision of the police officers under his command, he is entitled to immunity from the state-law claims as well.

The plaintiffs further contend that the discretionary immunity provisions of section 8111(1)(C), as applied to the individual officers and Chief Allanach, are violative of Article I, sections 19 and 20 of the Maine Constitution. Section 19 provides that:

> Every person, for an injury inflicted on the person or the person's reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay."

Section 20 provides that:

> In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced; the party claiming the right may be heard by himself or herself and with counsel, or either, at the election of the party.

The plaintiffs' contention with respect to section 19 is inconsistent with the interpretation of this provision adopted by the Law Court: ``[T]he court must be accessible to all persons alike without discrimination, at times and places designated for their sitting, and afford a speedy remedy *for every wrong recognized by law as remediable in a court*." *Peters v. Saft*, 597 A.2d 50, 54 (Me. 1991) (emphasis added, citation omitted). Although section 19 enshrines the notion that ``there should be no wrong without a remedy," *Black v. Solmitz*, 409 A.2d 634, 635 (Me. 1979), when a claim is precluded by the discretionary immunity conferred by the Tort Claims Act, it is no longer a wrong recognized by law and, thus, section 19 is not implicated. *See also McGuire v. Sunday River Skiway Corp*., 1994 U.S. Dist. LEXIS 13061 (D. Me. Sept. 2, 1994) at *16 n.6 (noting that section 19 is ``primarily a mandate to the judiciary, not the legislature). Similarly, the Law Court has interpreted the right to jury trial set forth in section 20 to mean that, ``*with respect to those questions of fact that the substantive law makes material*, the party has the right to have a determination made by the jury." *Peters*, 597 A.2d at 53 (quoting *English v. New England Medical Center*, 541 N.E. 2d 329, 331 (Mass. 1989), emphasis added). When a defendant is immune from suit pursuant to the Tort Claims Act, the plaintiff's claim does not raise questions of fact that the law makes material and, therefore, there is no entitlement to a jury trial pursuant to the Maine Constitution.

The plaintiffs finally contend that discretionary immunity for municipal employees in connection with their tortious conduct violates the equal protection provisions of both the federal and Maine constitutions. The cases cited by the plaintiffs do not support the asserted proposition. In *Reed v. Reed*, 404 U.S. 71 (1971), the Supreme Court noted that the Equal Protection Clause of the Fourteenth Amendment denies to states ``the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the

objective of that statute." *Id*. at 75-76. Accordingly, the Court invalidated an Idaho statute giving preference to men over women for appointment as administrators of estates in probate proceedings. *Id*. at 76. The provisions of the Tort Claims Act conferring discretionary immunity on police officers do not separate potential plaintiffs into different classes based on criteria that are wholly unrelated to the objectives of the statute. In the other case cited by the plaintiffs, *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980), the Supreme Court of New Hampshire invalidated certain statutory provisions governing medical malpractice claims, explicitly basing its holding on the equal protection provisions of that state's constitution and applying thereunder a higher level of scrutiny than would have been applicable pursuant to the federal constitution. *Id*. at 932, 945; *see Fichter v. Bd. of Envtl. Protection*, 604 A.2d 433, 436 (Me. 1992) (equal protection requirements of federal and Maine constitutions are identical). Since the present case does not involve medical malpractice and does not arise under the New Hampshire constitution, *Carson* is inapplicable.

``The Constitution does not create a fundamental right to pursue specific tort actions. States may create immunities which effectively eliminate causes of action, subject only to the requirement their action not be arbitrary or irrational." *Edelstein v. Wilentz*, 812 F.2d 128, 131 (3d Cir. 1987) (citations omitted) (no violation of equal protection clause in statute conferring absolute immunity on attorney ethics grievants). As the Supreme Court noted in connection with an unsuccessful challenge to an immunity provision on due process grounds, ``the state's interest in fashioning its own rules of tort law is paramount to *any discernable federal interest*, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282 (1980) (emphasis added). The Supreme Court has unambiguously recognized the

salutary purpose in making government officials immune from civil liability in appropriate circumstances:

> When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it.

Forrester v. White, 484 U.S. 219, 223 (1988). The plaintiff offers no guidance to the court concerning how the immunity provision challenged here operates in an arbitrary or irrational manner; indeed, the statute treats all similarly situated plaintiffs in the same manner. Accordingly, I find no violation of the equal protection clauses of the Maine or U.S. constitutions.

V. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **GRANTED** in part and **DENIED** in part, and, accordingly, that judgment for all defendants except the City of Westbrook be entered on Counts I (assault), II and III (claims arising under the Maine Tort Claims Act); and for all defendants except Chief Allanach and the City of Westbrook on Count IV (section 1983).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 19th day of December, 1994.

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David M. Cohen
United States Magistrate Judge